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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-992

TURNER BROADCASTING SYSTEM, ET AL., APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE FEDERAL APPELLEES IN OPPOSITION TO APPELLANTS' MOTION TO EXPEDITE

The Solicitor General, on behalf of the Federal Communications Commission and the United States, respectfully opposes the appellants' motion to expedite the above-captioned case, for the following reasons:

1. This complex case raising a First Amendment challenge to an Act of Congress has, thus far, yielded a record of "tens of thousands of pages." J.S. 39a (dissenting opinion). Much of that record has not previously been before this Court, for it was compiled after the Court remanded the case to the district court for further proceedings and, in particular, for the resolution of "unresolved factual issues," so that "the parties could develop a more thorough factual record." Turner Broadcasting System, Inc. v.

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FCC, 114 S. Ct. 2445, 2472 (1994) (Turner I); see also J.S. 2a (discussing purpose of remand). The remand resulted in three opinions by the three judges of the special district court. Each judge closely analyzed the evidence and reached somewhat differing conclusions about that evidence, which conclusions were set forth in considerable detail in the resulting opinions.

In light of the intensely factual nature of this case, as well as the detail and complexity of the evidence presented to and discussed by the judges of the special district court, we respectfully submit that this Court would not be well served by rushed proceedings in this case. Contrary to appellants' suggestion that essentially legal questions are now at issue in the case (J.S. 15), the principal doctrinal issues in the case (namely, the applicable standard of review, and the showing required to be made under intermediate scrutiny) were determined by this Court in Turner I. The Court's resolution of those legal issues is not only entitled to the weight of stare decisis, but is also the settled law of the case for purposes of the present appeal.

This case now involves principally an evaluation of the record compiled on remand. Therefore, the government and the other appellees will have to review the record comprehensively and compare the record with the conclusions reached by the majority and by the dissenting judge. Given the great length of the record and the complexity of the factual issues treated in the various opinions, we believe that the usual time for responding to the jurisdictional statement and, if the case is set for plenary

review, for briefing, is necessary to the task at hand.

2. Expedited proceedings, at least at the stage of responding to the jurisdictional statement, would cause hardship to the governmental appellees. First, the period for response encompasses the Christmas Day and New Year's Day holidays; in effect, the schedule proposed by appellants would leave the government with only ten working days (including time already elapsed) in which to review the record, and prepare and print the response. Second, the government at this point is considerably hampered in responding to the jurisdictional statement because of the lapse of appropriations affecting both the Department of Justice and the Federal Communications Commission (FCC). That lapse has resulted in the furlough of some of the legal, paralegal, and clerical staff in both agencies. Third, the Solicitor General's Office is already under an obligation to meet expedited briefing schedules in at least four other pending cases on plenary review in this Court.

3. Appellants' papers do not indicate that there is an urgent need for expedited disposition of this case. Appellants state that cable operators "voluntarily" will continue to carry most broadcast stations. J.S. 11. Judge Sporkin's opinion points out that broadcast stations that were added to cable systems solely because of must-carry account for only 1.2% of all cable channel capacity at this time, J.S. App. 19a, and that figure will diminish as average cable channel capacity continues to expand, id. at 21a (average of 180 channels per system by 2003). Therefore, there is

no immediate, pressing burden on appellants' business interests that would warrant expedition. And since the statute has been upheld as constitutional and comes to this Court with a heavy presumption of constitutionality, the situation here is not (as appellants suggest, Motion at 8) like that in Elrod v. Burns, 427 U.S. 347, 373 (1976), in which the plurality affirmed the court of appeals' direction to enter a preliminary injunction once the plaintiffs in that case demonstrated a probability of success on the merits.

Appellants suggest that this case could affect broadcast stations' decisions, in October 1996, whether to request compensation from cable operators for retransmission of their signals. The broadcasters and cable operators would only be subject to a change in position, however, if this Court reverses the district court outright (rather than affirming or vacating and remanding for further proceedings). The current legal posture is the same as has existed since Congress enacted the 1992 Cable Act, namely, that broadcasters know that they may demand carriage or, alternatively, compensation for retransmission of their signals. The legal obligations of the broadcasters and cable operators are therefore settled as of now; appellants have produced nothing to indicate that there will be serious disruptions if this Court reverses the district court and the parties must make new arrangements. Appellants also suggest that this case could affect the FCC's ongoing rulemaking proceedings into the applicability of "must-carry" rules to broadcasters' expanded digital broadcast

signals. The actual effect of such rules, however, if extended by the FCC, would not be felt for several years. Moreover, the rulemaking proceeding could simply be abandoned or extended if the Cable Act's "must-carry" provisions are held unconstitutional.

In sum, appellants have shown no extraordinary circumstances warranting an expedited briefing schedule, and the extensive record on remand and intensely factual nature of the issues remaining open on this appeal strongly counsel in favor of observing the normal briefing schedules prescribed by this Court's Rules.

For the foregoing reasons, the appellants' motion to expedite should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DECEMBER 1995